IN THE COURT OF APPEALS OF THE STATE OF ALASKA

RAYMOND S. ZAUKAR, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-10916 Trial Court No. 3AN-08-7170 CR MEMORANDUM OPINION No. 6359 — July 20, 2016

Appeal from the Superior Court, Third Judicial District, Anchorage, Jack W. Smith, Judge.

Appearances: Brooke V. Berens and Marcelle K. McDannel, Assistant Public Advocates, Appeals & Statewide Defense Section, and Richard Allen, Public Advocate, Anchorage, for the Appellant. Tamara E. de Lucia, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Michael C. Geraghty, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Hanley, District Court Judge.*

Judge MANNHEIMER.

* Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

Raymond S. Zaukar appeals his convictions for first-degree sexual assault and fourth-degree assault. He argues that the trial court committed error by failing to declare a mistrial after it was revealed (during the jury's deliberations) that one of the jurors had received extra-judicial information about the case.

For the reasons explained here, we conclude that the trial judge did not abuse his discretion when he decided to handle the problem by other means: by cautioning the juror, and by obtaining the juror's promise that she would not allow her decision to be influenced by this information.

Underlying facts, and the litigation of this issue in the trial court

The jury began its deliberations on the afternoon of June 24, 2010. On the following day, one of the jurors sent a note to the judge, informing him that she had heard some information about the case from an extra-judicial source. In response to the juror's note, the judge called the juror into the courtroom to explain the situation.

The juror in question told the court that she had two houseguests (two relatives) who had been attending the trial, and that she had overheard these houseguests discussing the case. During their discussion, the houseguests mentioned that Leon O'Donnell, a man who witnessed some of the events in this case, was currently in jail in the Lower 48, and that was why he had not testified at Zaukar's trial.

After the juror explained what had happened, the trial judge addressed her personally:

> *The Court*: All right. ... [H]ave you passed any of that information [on] to the other jurors?
>
> *Juror*: No.

> *The Court*: And you understand that, because that ... information was [not] presented in [the] trial, you're not to consider that at all as you make your decision.
>
> *Juror*: I understand.
>
> *The Court*: You're willing to follow that instruction?
>
> *Juror*: Yes. ... I mean, this doesn't affect me, whether he's in jail or not. It has no effect on my opinion of anything.

The judge asked the attorneys if they had any other questions for the juror. Zaukar's attorney did not respond to the judge's inquiry. The judge then allowed the juror to return to the jury room.

After the juror left the courtroom, Zaukar's attorney asked for a mistrial. The defense attorney told the judge that a mistrial was necessary because the juror had overheard "very important information" that was not presented during the trial, and the defense attorney doubted that the juror could put this information aside. The defense attorney argued that "this is what mistrials are for: [situations where] a juror hears information that ... they're not supposed to have access to."

The information that the juror had overheard — *i.e.*, the fact that Leon O'Donnell was in jail — was arguably relevant to one of the points that Zaukar's attorney had made in her summation the day before. In her summation, the defense attorney referred several times to the fact that the State had not called several potential witnesses — among them, Leon O'Donnell — to testify at trial, and the defense attorney suggested that the State's failure to call these witnesses should be viewed as a weakness in the State's proof. If there was a reason for O'Donnell's absence, this would undercut the strength of the defense attorney's argument to some extent.

Nevertheless, the trial judge concluded that a mistrial was not necessary:

> *The Court*: [This problem] doesn't rise to the level of [requiring] a mistrial. Certainly, [the juror] is aware of that information [about O'Donnell]. But ... she expressed very emphatically that it didn't impact her thought process in the case. She has not mentioned it to the other jurors and ... [she] isn't going to do so, because she's been instructed not to do so. So I'll deny the motion for mistrial.

Zaukar's argument on appeal, and why we affirm the trial judge's decision

In his brief to this Court, Zaukar argues that the trial judge abused his discretion when he denied the request for a mistrial. As we have explained, when Zaukar's trial attorney delivered her summation to the jury, she repeatedly mentioned the State's failure to call several potential witnesses, including O'Donnell, and she suggested that the State's failure to call these witnesses was a weakness in the State's proof. Zaukar now argues that, because the juror had information about O'Donnell's whereabouts (specifically, his incarceration in another state), the juror would discount the defense attorney's summation.

Indeed, Zaukar now asserts that O'Donnell would have been "the State's key witness if he had testified" — and, therefore, the fact that the State failed to call O'Donnell to the stand was "critical" to the defense argument that the State mishandled the investigation of the case, and that the State did not present sufficient evidence to warrant a conviction.

Zaukar also points out that, to the extent the juror in this case might have believed that O'Donnell was unavailable to the State (*i.e.*, believed that the State was powerless to secure O'Donnell's presence because of his incarceration in another state), the juror's belief was false. Although O'Donnell was incarcerated in another state, he

was incarcerated because of a criminal conviction in Alaska. In other words, O'Donnell was serving an Alaska sentence in an out-of-state prison, and the State of Alaska could have demanded his return.

Zaukar faults the trial judge for failing to respond to these concerns when he issued his ruling on the mistrial motion. But these concerns were never presented to the trial judge.

When Zaukar's trial attorney argued the mistrial motion to the judge, she did not assert that O'Donnell would have been the State's key witness, nor did she assert that the State's failure to call O'Donnell to the stand was "critical" to the defense argument that the State mishandled the investigation of the case, nor did she mention any of the other aspects of the situation that we have just described. At trial, the defense attorney simply asserted, without explanation, that the information concerning O'Donnell's incarceration in another state was "very important", that this information would undoubtedly "affect [the juror's] decision" (in unspecified ways), and that a mistrial was always necessary whenever a juror was exposed to information that the juror was not supposed to have access to.

This last contention is wrong. The fact that one or more jurors are exposed to information that they were supposed to be sheltered from does not necessarily require the judge to declare a mistrial. This Court has previously addressed situations where witnesses volunteered inadmissible information, or gave testimony in violation of a protective order, as well as situations where jurors improperly learned that the defendant was in custody or had been charged with other crimes. In all these instances, we applied the principle that the trial judge is in the best position to assess whether a mistrial is

required — and that, for this reason, the decision whether to declare a mistrial is entrusted to the judge's discretion. [1]

Zaukar nevertheless argues that we should apply a *de novo* standard of review — *i.e.*, that we should independently assess whether a mistrial was required, without any deference to the trial judge's decision. Zaukar contends that, under any given set of facts, it is a question of law whether a mistrial is required.

We reject this contention. In fact, Zaukar's case presents a good illustration of why an appellate court should defer to the trial judge's assessment. Here, the underlying problem was one juror's exposure to extra-judicial information. To investigate the potential effect of this occurrence, the judge had to question the juror and evaluate the juror's explanation of what had occurred — both the details of what the juror said, and the credibility of the juror as a witness. The judge also had to assess whether an admonition to this juror would be sufficient, and whether this juror could realistically be trusted to abide by her promise to set this information aside.

Compared to appellate judges whose knowledge of the case is derived from reading the "cold" record, the trial judge in Zaukar's case was face-to-face with the juror and was in a far superior position to evaluate all of these matters. This is exactly the kind of situation that calls for the "abuse of discretion" standard of review. Thus, our task on appeal is not to independently decide whether we would have granted a mistrial, but rather to decide whether the trial judge responded reasonably to the situation.

---

[1] *See*, *e.g.*, *Hewitt v. State*, 188 P.3d 697, 699 (Alaska App. 2008) ("The question of whether a particular mistake or occurrence requires a mistrial is entrusted to the trial judge's discretion, and an appellate court will reverse the trial judge's decision only if the judge has abused that discretion."); *Tritt v. State*, 173 P.3d 1017, 1019 (Alaska App. 2008).

Having reviewed the record of Zaukar's case, we conclude that the trial judge responded reasonably when, based on the facts and arguments presented to him, he denied the defense attorney's request for a mistrial.

It is undisputed that the juror in question heard extra-judicial information about the case — the fact that O'Donnell was incarcerated in another state. It is apparent that the juror knew this should not have happened, because she voluntarily apprised the court that she had been exposed to this information.

Zaukar's defense attorney conclusorily asserted that the juror would be unable to set this information aside. But when the judge questioned the juror, she personally assured the judge that she *could* put this information aside, and that it would not affect her view of the case. We note that the defense attorney passed up the judge's invitation to ask the juror additional questions about her ability to set this information aside.

Moreover, the defense attorney did not draw the trial judge's attention to the potential connection between the juror's extra-judicial information (the ostensible explanation for O'Donnell's absence from the trial) and the "failure to call witnesses" argument that the defense attorney had made during her summation to the jury. Nor did the defense attorney point out that the juror would be mistaken if she believed that O'Donnell was unavailable as a witness simply because he was in jail in another state.

In essence, Zaukar is arguing on appeal that the trial judge's refusal to grant a mistrial *would have been* unreasonable if the judge had rejected the arguments that Zaukar now makes on appeal. But Zaukar's trial attorney never made these arguments. And it was not the trial judge's job to figure out all the potential theories Zaukar's

attorney might conceivably advance as to why the juror's answers on *voir dire* might be inadequate, or why (despite the juror's assurances) a mistrial might still be required. [2]

We conclude that, under the facts of this case, the trial judge responded reasonably to the arguments that *were* made to him, and that the judge did not abuse his discretion when he declined to declare a mistrial on the ground presented.

Conclusion

The judgement of the superior court is AFFIRMED.

---

[2] *See Pierce v. State*, 261 P.3d 428, 433 (Alaska App. 2011).